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IN THE

Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, AND STEPHEN GOLDSMITH, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF INDIANAPOLIS,

Petitioners,

v.

JAMES EDMOND, ET AL.,

Respondents.

On Writ Of Certiorari to the United States Court of Appeals For the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether checkpoints at which law enforcement officers briefly stop vehicular traffic, check motorists' licenses and vehicle registrations, look for signs of impairment, and walk a "narcotics detection" dog around the exterior of each stopped automobile are unlawful under the Fourth Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a strong interest in legal issues that affect state and local governments.[1]

As Justice Powell wrote, "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances." *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring). The drug trade destroys lives and families, causes crime, ruins neighborhoods, disrupts schools, strains the health care systems of urban areas, and harms business, industry and workplaces. *See* U.S. Department of Justice, Bureau of Justice Statistics, *Drugs, Crime, and the Justice System* 7-14 (1992).

The pervasiveness and extent of the harms caused by drug trafficking mandate innovative approaches to law enforcement efforts. Like other States and local governments, Indianapolis has initiated a highly effective program of drug checkpoints, which is modeled on the programs upheld by this Court in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). The program is conducted under strict guidelines which constrain police discretion and involves only a brief delay to motorists. The sole difference between Indianapolis'

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

program and those which the Court has previously upheld is that each car is subject to a non-invasive dog sniff. *See United States v. Place*, 462 U.S. 696, 707 (1983). This, however, does not render the program a violation of the Fourth Amendment's prohibition against unreasonable seizures.

Acknowledging that under existing Fourth Amendment doctrine "these roadblocks probably are legal," Pet. App. 3a, the court of appeals devised a novel rule to invalidate the program. According to the court, "the purpose behind the *program* is critical to its legality" and "[t]he program must be a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals." *Id.* at 10a. This rule is inconsistent with the text of the Fourth Amendment and this Court's cases, which use an objective inquiry to assess the reasonableness of police procedures. It threatens other constitutionally reasonable police procedures whenever they are used primarily for general criminal law enforcement.

Because of the importance of the issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

A police roadblock is a seizure under the Fourth Amendment, but the Fourth Amendment prohibits only those seizures that are unreasonable. The constitutionality of a roadblock is thus determined by "weighing . . . the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 51 (1979). Applying this test, the Court has twice upheld roadblocks. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

Indianapolis' program is likewise constitutional. The distribution, sale and use of illegal drugs is one of this country's most pressing problems. The roadblocks clearly advance the public interest as the program has resulted in an arrest rate of 4.7 percent for drug offenses and 4.3 percent for driving offenses.

Nor does the program unreasonably interfere with individual liberty. The roadblocks are carried out under a plan which imposes "explicit, neutral limitations on the conduct of individual officers," *Brown v. Texas*, 443 U.S. at 51, and does not permit deviation from the procedure absent additional justification. Moreover, the location of the roadblocks is selected weeks in advance by officers at the supervisory level.

The level of objective intrusion is only marginally greater than that of sobriety checkpoints, which the *Sitz* Court characterized as "minimal." 496 U.S. at 452. The average duration of a stop is two to three minutes or less, Pet. App. 28a, 57a, a shorter period than that upheld in *Martinez-Fuerte*. *See* 428 U.S. at 547. The only significant difference between Indianapolis' program and those upheld in *Martinez-Fuerte* and *Sitz* is the dog sniff. A dog sniff, however, is a limited noninvasive procedure that does not require a driver to open car doors, the glove compartment, or the trunk. "It does not expose noncontraband items that otherwise would remain hidden from public view" and "discloses only the presence or absence of narcotics, a contraband item." *United States v. Place*, 462 U.S. 696, 707 (1983). There is "no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Id.* Indeed, the Court has held that a dog sniff is not "a 'search' within the meaning of the Fourth Amendment." *Id.* The objective intrusion of Indianapolis' roadblocks is thus well within the range of constitutional reasonableness.

The subjective intrusion of Indianapolis' program – "the fear and surprise engendered in law-abiding motorists by the nature of the stop," *Sitz*, 496 U.S. at 452 – does not render it constitutionally unreasonable. Motorists are provided with " 'visible signs of the officers' authority,'" *id.* at 453 (quoting *Martinez-Fuerte*, 428 U.S. at 558) including signs announcing the checkpoint and the presence of thirty police officers and several cruisers. Motorists can also see that the procedure is conducted in a regularized manner. Finally, having a dog led around the exterior of one's car does not create fear and anxiety in a "law-abiding motorist[]," *id.* at 452, to any greater degree than police walking around the car to check for working lights, a valid license plate, and inspection sticker. It is also far less likely to generate fear and anxiety than the selective referrals for further questioning, even in the absence of articulable suspicion, which the Court upheld in *Martinez-Fuerte*. *See* 428 U.S. at 560.

The court of appeals acknowledged that if the reasonableness of Indianapolis' program "is to be assessed at the level of the entire program . . . these roadblocks probably are legal, given the high 'hit' rate and the only modestly intrusive character of the stops." Pet. App. 3a. The court failed, however, to follow this Court's precedents, reasoning instead that "courts do not usually assess reasonableness at the program level when they are dealing with searches related to general criminal law enforcement rather than to primarily civil regulatory programs for the protection of health, safety, and the integrity of our borders." *Id.* at 4a. Because Indianapolis acknowledged that the primary purpose of its roadblocks was to interdict drug offenders, the court held the program unconstitutional.

The court of appeals' contention that courts do not assess the reasonableness of police procedures related to general criminal law enforcement by conducting program-level balancing cannot be squared with cases such as *Martinez-Fuerte*

and *Sitz*, which employed this approach. It ignores that in *Martinez-Fuerte*, each of the non-governmental parties had been indicted for multiple felony offenses. And while *Sitz* did not arise out of a criminal prosecution, the Court was surely cognizant of the consequence for those found at a roadblock to have been driving under the influence. It also ignores other cases in which this Court has relied on programmatic justifications to uphold police procedures related to general criminal law enforcement. *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968).

This Court's cases also refute the court of appeals' contention that inquiry into a program's purpose "is critical to its legality," and because Indianapolis' "program has no regulatory purpose," it is constitutionally unreasonable. Pet. App. 10a. Aside from the fact that the district court found that Indianapolis' program had the secondary purpose of checking driver's licenses and vehicle registrations, this Court has "never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment." *Whren v. United States*, 517 U.S. 806, 812 (1996). Furthermore, in *Sitz* the Court expressly rejected the contention that "there must be a showing of some special governmental need 'beyond the normal need' for criminal law enforcement before a balancing analysis is appropriate." 496 U.S. at 450. That the government's purpose is to enforce the criminal law as opposed to a regulatory program is not probative of whether police conduct that does not amount to a search is constitutionally reasonable.

The court of appeals' inquiry into purpose is also unworkable, as shown by the court's suggestion that the result might be different "if the primary purpose were to detect drunken drivers" because "the dog could be added to the roadblock scenario on the theory that since a sniff is not a search, the incremental invasion of privacy would be negligible." Pet.

App. 11a. Rather than engage in an inquiry which the Fourth Amendment provides no standard for resolving, courts should examine the intrusiveness of the procedures used at a roadblock to determine whether the interference with individual liberty is so severe as to render it constitutionally unreasonable. Because Indianapolis' procedures do not unreasonably intrude on motorists' liberty, the program is constitutional.

ARGUMENT

INDIANAPOLIS' ROADBLOCK PROGRAM SATISFIES THE FOURTH AMENDMENT

The court of appeals failed to follow settled Fourth Amendment principles in striking down Indianapolis' highly effective roadblock program. The court acknowledged that "[i]n the case of Indianapolis' drug-roadblock program, the probability of a 'hit' is high," that "the deterrence of drug offenses produced by these hits advances the strong national, state, and local policy of discouraging the illegal use of controlled substances," and that "[t]he cost—in delay, anxiety, and invasion of privacy—to the drivers and passengers stopped for five minutes at a roadblock and subjected to a visual inspection of the interior and a sniff by a dog is small," Pet. App. 4a, thus demonstrating that the program satisfies the three-part test of *Brown v. Texas*, 443 U.S. 47 (1979).[2]

Viewing the program as a "method[] of policing associated with totalitarian nations," Pet. App. 4a-5a, the court of appeals failed to apply the *Brown* test. It did so notwithstanding that *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), applied this test in upholding sobriety checkpoints for drivers "under the influence of alcohol or controlled substances." Brief for Petitioners at 6, *Sitz* (No. 88-1897); *see*

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[2] Indeed, the cost to motorists is even less than this, as the district court found that "[a] typical stop lasts 2 to 3 minutes." Pet. App. 28a (citing Depew Aff. ¶ 5, Pet. App. 57a-58a).

also Pet. App. 7a (*Sitz* upheld "roadblocks at which drivers are checked for being under the influence of alcohol or (other) mind-altering drugs"). According to the court of appeals, "the purpose behind the *program* is critical to its legality." *Id.* at 10a. In the court's view, because the City's program "is meant to intercept a completely random sample of drivers [and] there is neither probable cause nor articulable suspicion to stop *any* given driver," *id.* at 6a, it is constitutionally unreasonable unless it is "a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals." *Id.* at 10a. Because the city openly acknowledged that the program's primary purpose is "to interdict unlawful drugs," *id.* at 51a (stipulation), the court held that Indianapolis' roadblocks violate the Fourth Amendment.

As explained below, the court of appeals' rule is unhelpful in determining whether Indianapolis' roadblocks are reasonable under the Fourth Amendment. While "inquiry into purpose is one method of identifying and banning the most flagrantly abusive governmental conduct," Pet. App. 11a, interdicting drug offenders is as indisputably valid and compelling a governmental purpose as "detect[ing] drunk drivers." Pet. App. 10a-11a; *see United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring). Moreover, the *Brown v. Texas* standard identifies "the most flagrantly abusive governmental conduct," Pet. App. 11a, because it examines "the degree to which the seizure advances the public interest." 443 U.S. at 51. Indianapolis' roadblocks are only minimally more intrusive to motorists than the roadblocks upheld in *Sitz* and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). The incremental intrusion of a dog sniff – which itself is not a search, *see United States v. Place*, 462 U.S. 696 (1983) – does not render Indianapolis' roadblocks constitutionally unreasonable. While law enforcement experts might disagree over the best methods for interdicting drug offenders, the Court has made clear that the Fourth Amendment leaves it to

politically accountable state and local officials to choose among constitutionally reasonable alternatives. *See Sitz*, 496 U.S. at 453-54.

A. *Brown v. Texas* Provides The Standard For Determining The Constitutionality Of Indianapolis' Checkpoints

It is well settled that police roadblocks or " 'checkpoint stops are 'seizures' within the meaning of the Fourth Amendment.'" *Sitz*, 496 U.S. at 450 (quoting *Martinez-Fuerte*, 428 U.S. at 556). The Fourth Amendment, however, does not prohibit all seizures but only those which are unreasonable. *See id.; see also United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). "The reasonableness of seizures that are less intrusive than a traditional arrest depends " ' "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." ' " *Brown v. Texas*, 443 U.S. at 50 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (quoting *Brignoni-Ponce*, 422 U.S. at 878)). The Court has further explained that "[c]onsideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* at 50-51.

The essential concern in assessing the reasonableness of a seizure short of arrest is to protect "the individual's right to personal security free from arbitrary interference by law officers." *Brignoni-Ponce*, 422 U.S. at 878. *See Sitz*, 496 U.S. at 450; *Brown*, 443 U.S. at 51. "[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of a particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown*, 443 U.S. at 51. Thus, while the Court has held that random

stops of motorists which are not based on individualized suspicion are constitutionally unreasonable, *see Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *Brignoni-Ponce*, 422 U.S. at 882-84, it has twice upheld roadblocks conducted by officers whose discretion has been properly circumscribed to protect against arbitrary police conduct. *See Sitz*, 496 U.S. at 450-53; *Martinez-Fuerte*, 428 U.S. at 559-64.

1. In *Martinez-Fuerte*, the Court held that the Border Patrol's operation of fixed roadblocks to detect illegal aliens, which were established on major highways in Southern California and Texas 65 to 90 miles from the Mexican border, were reasonable under the Fourth Amendment notwithstanding that the government did not have reasonable suspicion to stop any single vehicle. *See* 428 U.S. at 545-50.[3] The Court began its Fourth Amendment analysis by noting "the substantiality of the public interest in the practice of routine stops for inquiry at permanent checkpoints," and that "[r]outine checkpoint inquiries apprehend many smugglers and illegal aliens who" use "important highways" as "a quick and safe route into the interior." *Id.* at 556-57. The Court thus concluded that the government's "need to make routine checkpoint stops is great." *Id.* at 557.

The Court then examined the degree to which the stops intruded on Fourth Amendment interests. The Court observed that the proceedure "involves only a brief detention of travelers during which all that is required of the vehicle's occupants

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[3] Although the court of appeals distinguished *Martinez-Fuerte* on the ground that it "depend[ed] ultimately on sovereign powers over foreign relations, foreign commerce, citizenship, and immigration that states and cities do not possess," Pet. App. 9a (citation omitted), the *Sitz* Court extensively relied on *Martinez-Fuerte* in upholding Michigan's sobriety checkpoints. *See, e.g.*, 496 U.S. at 450 ("*Martinez-Fuerte*, which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and *Brown v. Texas*, are the relevant authorities here.") (citations omitted).

is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *Id.* at 558 (internal quotations and citation omitted). Furthermore, "[n]either the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search." *Id.* While noting that "[t]his objective intrusion" also existed with the roving patrol stops which the Court held unconstitutional in *Brignoni-Ponce*, the Court explained that "we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop." *Id.* This is so, the Court reasoned, because " '[a]t traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.'" *Id.* (quoting *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975)).

The *Martinez-Fuerte* Court also found it significant that "checkpoint operations both appear to and actually involve less discretionary enforcement activity." *Id.* at 559. As the Court explained, "[t]he regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest." *Id.* The Court noted with approval that "[t]he location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources," who are "unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class." *Id.* Because "field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops." *Id.*

Adhering to these principles, the Court in *Delaware v. Prouse* held unconstitutional random spot checks of a driver's license and vehicle registration which are not based on "at least articulable and reasonable suspicion." 440 U.S. at 663. In particular, the Court noted that "[f]or Fourth Amendment purposes, we . . . see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community." *Id.* at 657.

Moreover, absent some degree of individualized suspicion, the Court could not "conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver." *Id.* at 661. It is "[t]his kind of standardless and unconstrained discretion [which] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Id.* Thus, while the Court held unconstitutional the spot check at issue in *Prouse*, it explained that "[t]his holding does not preclude the . . . States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663.[4]

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[4] In a concurring opinion, Justice Blackmun, joined by Justice Powell, likewise endorsed "the roadblock stop for all traffic" as an example of "less intrusive spot checks 'that do not involve the unconstrained exercise of discretion.' " 440 U.S. at 663-64 (quoting *id.* at 663). Justice Blackmun further expressed the view that "other not purely random stops (such as every 10th car to pass a given point) that equate with, but are less intrusive than, a 100% roadblock stop" are constitutionally reasonable. *Id.* at 464.

In *Sitz*, the Court upheld Michigan's sobriety checkpoints. The *Sitz* Court began by rejecting the motorists' argument – adopted by the court of appeals in this case – that application of the *Brown* balancing test was improper absent "a showing of some special governmental need 'beyond the normal need' for criminal law enforcement.'" 496 U.S. at 450 (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 665-66 (1989)). *Von Raab*, the Court explained, did not "repudiate our prior cases dealing with police stops of motorists on public highways. *Martinez-Fuerte*, which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and *Brown v. Texas*, are the relevant authorities here."[5] 496 U.S. at 450 (citations omitted).

Turning to the balancing test, the Court observed that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Id.* at 451. As for the interference with motorists' Fourth Amendment interests, the Court characterized the objective intrusion as "slight," adding that "[w]e see virtually no difference between the levels of intrusion on law-abiding motorists from the brief stops necessary to the effectuation of these two types of checkpoints, which to the average motorist would seem identical save for the nature of the questions the checkpoint officers might ask." *Id.*

The Court next rejected the Michigan court's conclusion that the subjective intrusion on motorists was substantial because the checkpoints had "the potential to generate fear and surprise in motorists." *Id.* at 452. The Court explained that "[t]he 'fear and surprise' to be considered are not the natural fear of one who has been drinking over the prospect of being

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[5] *Sitz*'s reliance on *Martinez-Fuerte* demonstrates the erroneousness of the court of appeals' view, *see* Pet. App. 9a, that the Fourth Amendment imposes greater restrictions on state than federal officials in conducting roadblocks.

stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law-abiding motorists by the nature of the stop." *Id.* Noting that the "checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle," the Court concluded that "[t]he intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*." *Id.* at 453.

Finally, the Court addressed "'the degree to which the seizure advances the public interest.'" *Id.* (quoting *Brown*, 443 U.S. at 51). In this regard, the Court explained that "[t]his passage . . . was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *Id.* While "[e]xperts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal," the Fourth Amendment leaves "the choice among such reasonable alternatives [to] the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Id.* at 453-54. Noting that "the record from one of the consolidated cases in *Martinez-Fuerte* showed that in the associated checkpoint, illegal aliens were found in only 0.12 percent of the vehicles passing through the checkpoint," and that "[t]he ratio of illegal aliens detected to vehicles stopped . . . was approximately 0.5 percent," the Court concluded that the Michigan checkpoint's arrest rate of 1.6 percent demonstrated the effectiveness of the program. *Id.* at 455.

2. Applying the principles of these cases, it is clear that Indianapolis' drug roadblock program satisfies the Fourth Amendment. The distribution, sale, and use of illegal drugs remains one of this country's most pressing problems. "The public has a compelling interest in detecting those who would

traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances." *United States v. Mendenhall*, 446 U.S. at 561 (Powell, J., concurring). Indianapolis is not immune from the harms caused by drug trafficking and drug abuse.[6] "[T]he magnitude" of the problem and the City's "interest in eradicating it" are uncontestable. *Sitz*, 496 U.S. at 451.

Nor can there be any dispute as to whether the drug roadblocks sufficiently "advance[] the public interest." *Sitz*, 496 U.S. at 453. Indianapolis conducted six roadblocks at which 1,161 cars were stopped. *See* Pet. App. 2a, 55a. These stops yielded 55 arrests for drug offenses, 49 arrests/citations for driving offenses, and 5 arrests for other offenses. *See id.* As a percentage of the vehicles stopped, the roadblocks resulted in arrests and citations at a rate of 4.7 percent for drug offenses and 4.2 percent for driving offenses. These results demonstrate that Indianapolis' program was substantially more effective than those which the Court upheld in *Sitz* and *Martinez-Fuerte*. *See Sitz*, 496 U.S. at 454-55 (1.6 % arrest rate for drunk driving demonstrated that roadblock advanced State's interest); *Martinez-Fuerte*, 428 U.S. at 554 (0.12 % arrest rate).

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[6] According to U.S. DEA statistics, 66.8 percent of adult males arrested in Indianapolis test positive for drug use in 1998. Since 1993, no less than 60 percent of adult males arrested in Indianapolis have tested positive for drug use. *See* U.S. Department of Justice, Drug Enforcement Administration, Table, *Percentage of Adult Males Testing Positive for Any Drug at Time of Arrest* (visited May 12, 2000) <http://www.usdoj.gov/dea/stats/drugstats.htm>. In 1998, 34.2 percent of Indianapolis' arrestees tested positive for cocaine, 45.1 percent tested positive for marijuana, and 1.8 tested positive for opiates. *See* Table, *Percentage of Adult Males Testing Positive for Specific Drugs at Time of Arrest in 1998* (visited May 12, 2000) <http://www.usdoj.gov/dea/stats/drugstats.htm>.

Nor does Indianapolis' program unreasonably "interfere[] with individual liberty." *Brown v. Texas*, 443 U.S. at 51. The roadblocks were "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id.* Roadblock locations "are selected at the supervisorial level weeks in advance based on geographic suitability, taking into consideration area crime statistics and the ability to locate the checkpoint in a location which will minimize the interference with normal traffic flow" while "permit[ting] observation of traffic approaching the checkpoint." Pet. App. 56a (affidavit of Sergeant Depew).

Moreover, "[t]he checkpoints are begun with [a] predetermined number of cars being stopped" and each "vehicle is processed in exactly the same fashion as all other vehicles," *id.* at 57a, with all drivers being asked to present their license and registration while a drug detection dog walks around the car. *See id.* at 54a, 57a. The next group of cars is not stopped until the last stopped car has been processed and allowed to depart. *See id.* at 57a. "[N]o deviations from" the car selection procedure are "permitted and under no circumstances are random stops permitted or utilized." *Id.* Further investigation is impermissible absent additional justification such as a driver's failure to present a valid license, plain view observation of contraband or a weapon, or a dog alert, which establishes probable cause. *See* Pet. App. 53a-54a. Indianapolis' procedure thus circumscribes the discretion of field officers to an even greater extent than the procedure upheld in *Martinez-Fuerte*, which allowed for the selective referral of motorists "to the secondary inspection area . . . on the basis of criteria that would not sustain a roving-patrol stop." 428 U.S. at 563.

Furthermore, Indianapolis' roadblocks do not unreasonably intrude on motorists' Fourth Amendment interests. The degree of " 'objective intrusion'" – as "measured by the duration of the seizure and the intensity of the investigation" – is only marginally greater than that of sobriety checkpoints,

which the *Sitz* Court characterized "as minimal." 496 U.S. at 452 (citation omitted). If a motorist presents a valid license and registration "and there is no probable cause presented by the officer's plain-view, plain smell[] examination, or a dog alert," the motorist is allowed to proceed. Pet. App. 57a. The average duration of such a stop is two to three minutes or less,[7] *see id.* at 28a, 57a, a period of shorter duration than that upheld by the Court in *Martinez-Fuerte*. *See* 428 U.S. at 547.

The only significant difference in the level of "objective intrusion" between Indianapolis' program and those approved in *Sitz* and *Martinez-Fuerte* is the dog sniff. But the incremental intrusion of a dog sniff conducted on a public street, where the dog's presence is lawful, is too insubstantial to render Indianapolis' program constitutionally unreasonable. A sniff "by a well-trained narcotics detection dog" of the exterior of a car is a non-invasive procedure as it does not require a driver to open car doors, the glove compartment or the trunk. *See United States v. Place*, 462 U.S. 696, 707 (1983). "It does not expose noncontraband items that otherwise would remain hidden from public view" and "discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of [a car], the information obtained is limited." *Id.* Indeed, there is "no other investigative pro-

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[7] When a motorist fails to present a valid license and registration, the police run a records check utilizing the on-scene mobile data terminal, which "may take an additional 15 seconds to two minutes." Pet. App. 58a; *see also id.* at 52a. A driver's failure to carry a license and registration is more than adequate justification to conduct further investigation. *See Prouse*, 440 U.S. at 658 ("[T]he States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed."). *See also, e.g.*, Ind. Ann. Code §§ 9-24-1-1 (requiring licenses); 9-24-18-5 (prohibiting driving while license is suspended or revoked).

cedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Id.* In short, a sniff is not "a 'search' within the meaning of the Fourth Amendment." *Id.* The intrusion is no greater than that which is constitutionally permissible at either a sobriety or immigration checkpoint.[8]

Likewise, the " 'subjective' intrusion" of Indianapolis' checkpoints – "the fear and surprise engendered in law-abiding motorists by the nature of the stop," *Sitz*, 496 U.S. at 452 (citation omitted) – does not render the program constitutionally unreasonable. Motorists are provided with "visible signs of the officers' authority," *id.* at 453 (citations omitted), including lighted signs which identify the checkpoints as a "NARCOTICS CHECKPOINT __ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP," Pet. App. 57a, the presence of "approximately thirty" police officers including uniformed patrolmen, and police cruisers. *Id.* at 52a. Furthermore, motorists can see that the procedure is conducted in a regularized manner, with all cars receiving the same initial processing. *See Sitz*, 496 U.S. at 453. Finally, having a dog led around the exterior of one's car does not create fear and anxiety in a "law-abiding motorist[]," *id.* at 452, to any greater degree than police walking around the car

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[8] In 1994-95, the State of Tennessee, with the assistance of a National Highway Traffic Safety Administration grant, conducted an extensive statewide sobriety checkpoint program, in which officers "used passive alcohol sensors in flashlights to detect the odor of alcoholic beverages." *See* U.S. DOT, NHTSA, Technical Report, Evaluation of *Checkpoint Tennessee:* Tennessee's Statewide Sobriety Checkpoint Program, Executive Summary at 4 < http://www.nhtsa.dot.gov/people/injury/research /ChekTenn/ChkptTN.html>. Such devices are functionally indistinguishable from drug detection dogs, in that they reveal only the presence or absence of alcohol odors in a driver's breath. An affirmance of the court of appeals' judgment would raise a serious question regarding the constitutionality of such non-invasive devices as passive alcohol detection sensors.

to check for working lights, a valid license plate and inspection sticker. And it far less likely to generate fear and anxiety in a law-abiding motorist then the selective referrals to a secondary inspection area for further questioning which the Court upheld in *Martinez-Fuerte*. *See* 428 U.S. at 560.

As the forgoing demonstrates, Indianapolis' program causes only an incremental interference with motorists' liberty, which is of insufficient magnitude to render it unconstitutional. The program's high degree of effectiveness demonstrates that it "advances the public interest," *Brown*, 443 U.S. at 51, and is thus constitutionally reasonable. Because the program satisfies the *Brown* standard, the court of appeals erred in invalidating it.

B. A Primary Purpose Of Interdicting Drug Offenders Does Not Render Indianapolis' Program Violative Of The Fourth Amendment

The court of appeals acknowledged that if the reasonableness of Indianapolis' program "is to be assessed at the level of the entire program . . . these roadblocks probably are legal, given the high 'hit' rate and the only modestly intrusive character of the stops." Pet. App. 3a. The court failed to follow controlling precedent, however, explaining that "courts do not usually assess reasonableness at the program level when they are dealing with searches related to general criminal law enforcement rather than to primarily civil regulatory programs for the protection of health, safety, and the integrity of our borders." *Id.* at 4a (citation omitted). According to the court, "[b]ecause it is infeasible to quantify the benefits and costs of most law enforcement programs, the program approach might well permit deep inroads into privacy." *Id.*

Evidently concluding that Indianapolis' program amounts to a "dragnet search" – a term which neither the court of appeals nor this Court have ever defined – the court further reasoned that "[a]lthough there is nothing in the text of the

Fourth Amendment to prevent dragnet searches . . . the Supreme Court has insisted that 'to be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing,' save in cases of 'special need' based on 'concerns *other than crime detection*.'" *Id.* at 5a (quoting *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997) (emphasis added by court of appeals)). In the court of appeals' view, "[p]rogram-level justifications for searches in support of specific regulatory programs do not carry over to general criminal law enforcement." *Id.* Because Indianapolis acknowledged that the primary purpose of the roadblocks was to interdict drug offenders, the court held the program unconstitutional.

1. The court of appeals' reasoning finds scant support in this Court's Fourth Amendment jurisprudence. The court's first contention – that it is improper to assess the reasonableness of Indianapolis' roadblocks "at the program level" by a balancing analysis because courts do not do so "when they are dealing with searches related to general criminal law enforcement rather than to primarily civil regulatory programs," Pet. App. 4a – simply ignores numerous cases in which this Court has done precisely that, including the most relevant authority of *Martinez-Fuerte* and *Sitz*.[9]

In *Martinez-Fuerte*, each of the non-governmental parties was a person who had been indicted on multiple counts of

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[9] Implicit in the court of appeals' statement is the suggestion that Indianapolis' roadblock stops are searches for purposes of the Fourth Amendment. Both *Sitz* and *Martinez-Fuerte* characterized the initial stop and questioning as a "seizure." *See Sitz*, 496 U.S. 450-51; *Martinez-Fuerte*, 428 U.S. at 556. Moreover, in *Place*, the Court held that a dog sniff is not "a 'search' within the meaning of the Fourth Amendment" because it is "limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." 462 U.S. at 707. To the extent the court of appeals analyzed Indianapolis' program as a search, it was mistaken.

illegally transporting aliens in violation of the former 8 U.S.C. § 1324(a)(2); several of the defendants had also been charged with other felony offenses. *See* 428 U.S. at 547-49. While *Sitz* did not involve the appeal of a criminal prosecution, the Court was obviously cognizant that the consequence for those found to have been "driving under the influence" was their arrest. *See* 496 U.S. at 448.

Notwithstanding the serious criminal consequences facing those apprehended in *Martinez-Fuerte* and *Sitz*, in both cases the Court analyzed the reasonableness of the police conduct at the program level by weighing, in the aggregate, the benefits to the public interest against the costs to the motoring public. In *Martinez-Fuerte*, the Court expressly noted that "[r]outine checkpoint inquiries apprehend many smugglers and illegal aliens," that the government's "need to make routine checkpoint stops is great," and that "[r]outine checkpoint stops do not intrude [unreasonably] on the motoring public." 428 U.S. at 557-58. In *Sitz*, the Court explicitly rejected the argument "that there must be a showing of some special governmental need 'beyond the normal need' for criminal law enforcement before a balancing analysis is appropriate." 496 U.S. at 450. The Court thereupon observed that " '[d]runk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage,'" and that "the weight bearing on the other scale – the measure of the intrusion on motorists stopped briefly at sobriety checkpoints – is slight." 496 U.S. at 451 (citation omitted).

While the court of appeals erroneously viewed the programs at issue in *Martinez-Fuerte* and *Sitz* as being "primarily civil regulatory programs," this Court's Fourth Amendment jurisprudence contains numerous cases relying on programmatic justifications to uphold police procedures "related to general criminal law enforcement." Pet. App. 4a. For example, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court held

that a police officer has the authority to conduct a pat down search for weapons on less than probable cause. The Court relied on FBI statistics which detailed the number of police officers killed or wounded in the line of duty nationwide, noting that "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." *Id.* at 23, 24 n.21.

The Court also acknowledged that "a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25. In holding that a police officer could conduct a pat down search on the basis of an articulable reasonable suspicion, the Court did exactly what the court of appeals asserted that courts do not do – "assess reasonableness at the program level" of a search "related to general criminal law enforcement." Pet. App. 4a. *See also* 392 U.S. at 21 ("there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails'") (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

The Court took the same approach in *United States v. Robinson*, 414 U.S. 218 (1973), upholding a police officer's authority to conduct a search incident to arrest notwithstanding the absence of probable cause to believe the arrestee was carrying a weapon or evidence. The Court refused to limit "the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes." *Id.* at 234. In the Court's view, this assumption rested on "a rather speculative judgment," which was refuted by FBI statistical data "indicat[ing] that a significant percentage of murders of police officers occurs when the

officers are making traffic stops." *Id.* at 234 & n.5 (citations omitted). As the Court explained, "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest." *Id.*

Recognizing the necessarily "*ad hoc* judgment" involved in a search incident to arrest, the Court held:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

Id. at 235. *See also Maryland v. Buie*, 494 U.S. 325, 332-34 (1990) (determining reasonableness of protective sweep of premises where arrest occurs by balancing governmental interest in police safety against arrestee's Fourth Amendment interests); *Place*, 462 U.S. at 703-04 (rejecting argument that "absent some special law enforcement interest such as officer safety, a generalized interest in law enforcement cannot justify an intrusion on an individual's Fourth Amendment interests in the absence of probable cause"); *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981) (upholding detention of occupant of house being searched on less than probable cause, reasoning that "[a]lthough no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence").

As the foregoing demonstrates, the Court routinely analyzes the reasonableness of police procedures "related to gen-

eral criminal law enforcement" by conducting "program level" assessments and balancing. Pet. App. 4a. Contrary to the view of the court of appeals, this approach does not "permit deep inroads into privacy," *id.*, as numerous cases demonstrate. *See, e.g., Place*, 462 U.S. at 703-10 (conducting balancing but holding unreasonable a ninety-minute seizure of a suspect's luggage to arrange a drug sniff that was supported by a reasonable suspicion but not probable cause), *Brown v. Texas*, 443 U.S. at 50-53 (holding unreasonable a discretionary seizure to require a person to identify himself which was not supported by "a reasonable suspicion" of criminal activity).

2. The Court's cases likewise refute the court of appeals' contention that inquiry into the program's purpose "is critical to its legality," and because "[t]he program has no regulatory purpose," it is constitutionally unreasonable. Pet. App. 10a. The first flaw in this reasoning is that the district court found that "a secondary purpose of the checkpoints is to check driver's licenses and vehicle registrations." *Id.* at 44a. Indeed, out of the program's 109 arrests and citations, 49 were for driving-related offenses. *See id.* at 55a. The court of appeals was clearly mistaken in asserting that the program "has no regulatory purpose." *Id.* at 10a.[10]

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[10] Even if not intended, it is clear that the use of a drug-sniffing dog advances the substantial state interest in promoting highway safety. According to NHTSA, "[a]lcohol and other drugs create a serious highway safety problem among the general driving population." *See* U.S. Department of Transportation, National Highway Traffic Safety Administration, *Drug Impaired Driving* (visited May 11, 2000) <http://www.nhtsa.gov/people/outreach/safesobr/15qp/web/iddrug.html >. NHTSA "estimates that drugs are used by approximately 10 to 22 percent of drivers involved in crashes, often in combination with alcohol." *Id.* A 1992 NHTSA study of the deaths of 1,882 drivers indicated that "alcohol was found in 51.5 percent of the drivers, and other drugs were found in 17.8 percent of the drivers." *Id.* A NHTSA study of "non-fatally injured drivers" found that "12 percent of all drivers tested positive for drugs

The second flaw is that while some of the Court's cases suggest that inquiry into purpose is sometimes relevant in assessing the validity of certain intrusions, almost every case has involved police conduct amounting to a search. *See, e.g., New York v. Burger*, 482 U.S. 691, 713-16 (1987) (upholding warrantless inspections of closely regulated businesses); *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (observing in dictum that "there is no suggestion" that an inventory search of a car "was a pretext concealing an investigatory police motive"). The Court has, however, "never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment." *Whren v. United States*, 517 U.S. 806, 812 (1996). In any event, there can be no claim of pretext here, where Indianapolis openly

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other than alcohol . . . and 23.5 percent of drivers less than 21 years old tested positive for drugs other than alcohol." *Id.* NHTSA further states that "[s]tudies of drug incidence among drivers arrested for motor vehicle offenses have found drugs in 15 to 50 percent of drivers. The higher rates typically are more prevalent among drivers who have been arrested for impaired or reckless driving but who were not impaired by alcohol, as shown by low blood alcohol concentration (BAC) levels." *Id.*

NHTSA also suggests a high degree of marijuana use by teenagers while driving. *Id.* According to NHTSA, twenty percent of high school seniors "reported that they smoke marijuana in a car." *Id.* This figure is greater than the percentage of students who acknowledge drinking alcoholic beverages in cars. *Id.* A recent Department of Justice survey which conducted personal interviews with DWI offenders indicates that 9.5 percent of jailed DWI offenders reported using drugs at the time of their arrest. U.S. Department of Justice, Bureau of Justice Statistics, *DWI Offenders under Correctional Supervision* 11 (Table 16) (1999).

Drug checkpoints are thus an important adjunct to alcohol sobriety checkpoints; indeed, the procedures upheld in *Sitz* checked for drivers who were under the influence of both alcohol and drugs. *See* Brief for Petitioners at 6, *Sitz; see also* Pet. App. 7a.

acknowledged that one of the purposes of the program was to conduct a "narcotics checkpoint." Pet. App. 57a.[11]

To the extent the court of appeals engaged in an objective inquiry into the City's purpose, the Court's cases support the view that a purpose of general criminal law enforcement does not preclude application of the *Brown* test in assessing the reasonableness of a seizure. In *Sitz*, the Court expressly rejected the contention that "there must be a showing of some special governmental need 'beyond the normal need' for criminal law enforcement before a balancing analysis is appropriate," and held that the *Brown* standard controlled. 496 U.S. at 450. *See also Florida v. Royer*, 460 U.S. 491, 498-99 (1983) (noting that in *Brignoni-Ponce* the government's purpose of enforcing immigration laws "was sufficient to warrant temporary detention for limited questioning" and declining to suggest "that a similar rationale would not warrant temporary detention for questioning on less than probable cause where the public interest involved is the suppression of illegal transactions in drugs or of any other serious crime"). That the government's purpose is to enforce the criminal law as opposed to a regulatory program is not probative as to whether

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[11] The court of appeals' reliance on dictum from the plurality opinion in *Texas v. Brown*, 460 U.S. 730 (1983), is misplaced. *See* Pet. App. 7a ("the amendment would be violated if 'the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in "plain view" in the course of a check for driver's licenses'") (quoting 460 U.S. at 743). The referenced language did not address the validity of the initial stop but rather whether the police properly seized evidence in plain view, the discovery of which was then required to be "inadvertent." At the time, a showing of pretext would have defeated a police claim that evidence had been discovered inadvertently. That requirement has since been overruled. *See Horton v. California*, 496 U.S. 128, 137-42 (1990). The objective inquiry established by *Horton* and *Whren* demonstrates that where the police have a constitutionally valid basis for a stop, it cannot be challenged as being pretextual.

police conduct that does not amount to a search is constitutionally reasonable.

3. This Court should reject the court of appeals' approach because it is unworkable and "injects too large an element of uncertainty into the interpretation" of the Fourth Amendment. Pet. App. 11a. Indeed, the court of appeals suggested that the result might be different "if the primary purpose were to detect drunken drivers" because "the dog could be added to the roadblock scenario on the theory that since a sniff is not a search, the incremental invasion of privacy would be negligible." *Id.* Just how a court would determine whether a roadblock program's primary purpose was detecting drunk drivers (or reducing traffic congestion) as opposed to catching drug offenders is unclear.[12] The Fourth Amendment does not answer the question, just as it says nothing that suggests why police practices which are undertaken for the purpose of enforcing the criminal law are more objectionable than those undertaken to enforce regulatory programs.

Contrary to the view of the court of appeals, "the alternative" is not "to rule that either all roadblocks are illegal or none are." *Id.* at 11a. Rather, consistent with *Brown*, *Martinez-Fuerte*, and *Sitz*, a court should examine the intrusiveness of the procedures used in conducting a roadblock to determine whether "the interference with individual liberty" is so severe as to render it constitutionally unreasonable. *Brown*, 443 U.S. at 51. Thus, a roadblock, at which police order –

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[12] *Compare United States v. McFayden*, 865 F.2d 1306, 1307-08 (D.C. Cir. 1989) (upholding checkpoint whose "principal purpose was to allow police to check for a driver's license and vehicle registration" even though it "facilitated a narcotics enforcement effort" and police testified "that they were hopeful that the roadblocks would also have a 'halo' or 'spin-off' effect of deterring drug trafficking"), *with Galbert v. United States*, 590 A.2d 990, 999 (D.C. 1991) (asserting that a roadblock "addressed to problems of general law enforcement . . . is antithetical to the Fourth Amendment").

without some articulable basis – every driver and passenger out of their car to conduct a more thorough plain view examination of a car's interior, might well be so intrusive as to render it unconstitutional. But where, as here, police discretion has been properly circumscribed, a roadblock that results in a brief delay to motorists and uses a non-intrusive measure that "discloses only the presence or absence of narcotics, a contraband item," *Place*, 462 U.S. at 707, is clearly within the range of constitutionally reasonable practices under the Fourth Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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